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No. 94-514

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA,

Petitioner,

vs.

MICHAEL E. GAUDIN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit corporation with a membership of more than 8,600 attorneys and 28,000 affiliate members, including representatives from all fifty states. The

1. The parties have consented to the filing of this Brief. Their letters of consent have been filed with the Clerk.

American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in the House of Delegates.

The NACDL was founded over twenty-five years ago to promote study and research in the field of criminal defense law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage integrity, independence and expertise of defense lawyers. Among the NACDL's stated objectives is the promotion of the proper administration of justice. Thus, the members of the NACDL have a vital interest in insuring that the integrity of the federal and state systems of criminal justice are protected. This includes an interest in this case, which presents an opportunity to correct a long-standing but flawed legal construct of criminal materiality under 18 U.S.C. § 1001, and to reformulate a new rule that materiality is a factual matter for the jury, consonant with contemporary case law and Fifth Amendment guarantees.

SUMMARY OF ARGUMENT

In a false statement prosecution under 18 U.S.C. § 1001, the generally accepted view that the sufficiency of the evidence to prove the element of "materiality" is a matter of law for the court's determination, rather than a matter of fact for the jury, is an unsupportable proposition which the Court of Appeals for the Ninth Circuit correctly rejected. *United States v. Gaudin*, 28 F.3d 943 (9th Cir. 1994) (*en banc*). Neither the traditional authority for treating materiality as a legal issue, *Sinclair v. United States*, 279 U.S. 263 (1929), nor the "reaffirmation" of that case in *Kungys v. United States*, 485 U.S. 759 (1988), contains any analysis or constitutional justification for a court to determine an essential element of a crime and to decide disputed facts at trial adversely to a criminal defendant. Extending the "materiality is a matter of law" rule from those cases to permit a judge to weigh disputed

evidence and to direct a government verdict on a disputed element of the crime under § 1001 is a misapplication of law. The rule the government relies upon conflicts with the due process guarantees articulated in *In re Winship*, 397 U.S. 358 (1970), and violates a defendant's right to a jury trial on all elements of the crime.

If conventional wisdom is flawed, it must be discarded. Questions of retroactivity and of the application of a new rule to other crimes containing a materiality element are simply questions for another day. *Gaudin* was correctly decided below and should be affirmed.

ARGUMENT

I.

NEITHER *SINCLAIR, KUNGYS* NOR HISTORY PROVIDES AN ADEQUATE RATIONALE FOR TREATING THE MATERIALITY ELEMENT OF 18 U.S.C. § 1001 AS A MATTER OF LAW OUTSIDE THE JURY'S PURVIEW.

The question presented in the government's petition for certiorari adroitly avoids confronting whether the "materiality" element of 18 U.S.C. § 1001 is a matter of law or fact.[2] The government asks whether materiality is "an *issue* to be decided by the court rather than the jury." (emphasis supplied). It is beyond dispute that factual issues must be decided by the jury, and it is uncontroverted that actual issues of law are properly determined by a court. Thus, a precise characterization of "materiality" — is it a matter of fact or law — should decide this

2. The government's Brief does not dispute the majority view of the circuit courts of appeals that materiality is an element of the crime under § 1001, and refers to "the materiality element." (Pet. Br. p. 12).

case *a fortiori*. The Court has recognized the difficulty in drawing the "elusive" fact/law distinction:

> [T]he Court has yet to arrive at "a rule or principle that will unerringly distinguish a factual finding from a legal conclusion." *Pullman-Standard v. Swint*, 456 U.S. 273, 288, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66 (1982).
>
> Perhaps much of the difficulty in this area stems from the practical truth that the decision to label an issue a "question of law," a "question of fact," or a "mixed question of law and fact" is sometimes as much a matter of allocation as it is of analysis. *See* Monaghan, *Constitutional Fact Review*, 85 Colum.L.Rev. 229, 237 (1985). At least in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.

Miller v. Fenton, 474 U.S. 104, 112, 113-114 (1985).[3] In a criminal trial in which "materiality" is an element of the crime and is disputed, materiality is a question of fact for the jury.

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3. *Fenton* did not implicate the judge-or-jury dilemma, but considered whether, in a 28 U.S.C. § 2254 habeas corpus proceeding, a district court's conclusion about the voluntariness of confession was a question of fact entitled to presumption of correctness, deciding that it was not. 474 U.S. at 112.

The government's position is essentially that historical practice and two cases from this Court establish that a judge is the proper judicial actor to determine materiality in a § 1001 case. The government makes that argument *despite* materiality being an acknowledged element of the crime under § 1001, and *despite* the fact that materiality was disputed in this case and was dependent upon testimonial proof. In failing to credit those indicia of a factual matter, the government sidesteps *In re Winship*, 397 U.S. 358 (1970), which requires that "[t]he government must prove beyond a reasonable doubt every element of a charged offense. *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)." *Victor v. Nebraska*, __ U.S. __, 114 S. Ct. 1239, 1242 (1994).

Merely by labeling materiality a matter of law, courts have justified their curious withdrawal of materiality from the jury. Years of repetition cannot convert a faulty premise into a sound one. Judge Posner has called that course "more than a little puzzling . . . ." *United States v. Staniforth*, 971 F.2d 1355, 1358 (7th Cir. 1992). Where materiality is a disputed issue in a false statement prosecution, the matter-of-law mantra must be rejected in favor of a principled adherence to the *In re Winship*, 397 U.S. 358 (1970), promise that all disputed facts in a criminal prosecution will be determined by a jury and based upon proof beyond a reasonable doubt.[4]

Neither *Sinclair v. United States*, 279 U.S. 263 (1929), nor

4. The government's assertion that "[t]he holding of *Winship* has no direct application in this case" because "*Winship* did not address the standards for distinguishing questions of law from issues of fact," (Pet. Br. 32), serves to bolster respondent's position that once one acknowledges that materiality is determined *at trial* after a factual showing, it must, under *Winship*, be submitted to the jury with the other elements of the crime. *See Department of Justice Manual* Vol. 9 § 9-42.143 (Prentice-Hall Law & Business 1989-2 Supp.) ("Materiality [in an 18 U.S.C. § 1001 prosecution] is best shown by the testimony of expert witnesses. . . ").

Kungys v. United States, 485 U.S. 759 (1988), can survive an analytically honest assessment of their statements that materiality is a matter of law. In *Sinclair,* this Court affirmed a conviction under 2 U.S.C. § 192, for Sinclair's refusal to answer any question "pertinent" to an inquiry conducted by a House of Congress. Sinclair claimed that the question asked was not "pertinent," but the Court approved the trial court's finding that the *question* was pertinent as a matter of law:

> The question of pertinency under § 102 was rightly decided by the court as one of law. *It did not depend upon the probative value of evidence.* That question may be likened to those concerning *relevancy* at the trial of issues in court, and it is not essentially different from the question as to materiality of false testimony charged as perjury in prosecutions for that crime. Upon reasons so well known that their repetition is unnecessary it is uniformly held that relevancy is a question of law . . . *And the materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court.*

279 U.S. at 298 (emphasis supplied). The final quoted sentence, clearly dictum in *Sinclair,* has been the legal justification for hundreds of subsequent judicial utterances that materiality in a §1001 prosecution is a matter for the judge. But when the materiality of false statements is contested and *is* dependent upon the probative value of the government's evidence — as in this case — "there's no there there" in *Sinclair.*[5]

5. Gertrude Stein, *Everybody's Autobiography* 289 (1st ed. 1937) (commenting on Oakland, California).

Questions are classically reviewed by a judge for relevance; answers pose a different question. One commentator has aptly stated the "*Sinclair* rule" to be based on a misunderstanding of the difference between materiality and relevance:

> The concept of "relevancy" concerns the admissibility of evidence. Conversely, materiality as an element of an offense is an issue upon which guilt or innocence depends. As the court stated in *United States v. Taylor,* [693 F. Supp. 828 (N.D. Cal. 1988)] "A ruling by the court regarding evidence simply determines what information a jury may consider in reaching its decision regarding the elements of an offense; a ruling by the court regarding materiality precludes the jury from ever reaching a decision regarding that element." The concepts of materiality and relevancy should be viewed as distinct. Therefore, comparing materiality to relevancy does not firmly support the rule that materiality is a question of law.

Kenneth M. Miller, *Materiality: An Element of 18 U.S.C. § 1001 and a Question for the Jury,* 23 Loy. L.A. L. Rev. 989, 1017 (1990) (citations omitted).

Clearly, the *Sinclair* Court did not consider the effect of its dictum as applied to cases where the probative weight of a statement, *i.e.,* the materiality, is an element of a crime. Unfortunately, neither did the Court in *Kungys v. United States,* 485 U.S. 759 (1988), when it once again "reaffirmed" the *Sinclair* dictum.

Kungys arose from a determination by a district court in a

civil, non-jury denaturalization case, that certain false statements in a visa and naturalization petition were *not* material under 8 U.S.C. § 1101(f)(6) and § 1451(a). 485 U.S. at 764-766. After first re-formulating the test for materiality in the denaturalization context ("whether [the concealments or misrepresentations] had a natural tendency to influence the decisions of the Immigration and Naturalization Service"), the Court "follow[ed] what has been done with the materiality requirement under other statutes dealing with misrepresentations to public officers" and considered materiality to be a question of law, and thus appropriate for appellate *de novo* review under the new test. *Id.* at 772. The Court cited *Sinclair* and a § 1001 case, *United States v. Abadi,* 706 F.2d 178 (6th Cir. 1983), in support of its conclusion that materiality was a matter of law. 485 U.S. at 772. However, *Abadi* decided that materiality should not be treated as an element of § 1001, but rather as a "judicially imposed limitation to insure the reasonable application of the statute." 706 F.2d at 180 n. 2. Thus, the *Abadi* court reasoned, the *Winship*-imposed beyond a reasonable doubt standard of proof was not required. *Id.* This Court's citation to *Abadi* did not discuss or endorse that reasoning.

In *Kungys,* a non-jury civil case, it was not necessary for the Court to consider whether the fact/law distinction, as applied to the element of materiality, implicated due process considerations under *Winship. Kungys* simply did not present the question framed in this case: may a district court judge, rather than a jury, decide the essential statutory element of materiality adversely to a criminal defendant, and direct a verdict against the defendant on that discrete element of the crime? The fact/law distinction in a false statement criminal case cannot comfortably rest upon decades, or even centuries of decisions which found materiality to be "law," but which overlooked the reality that it is an element of the crime based on the facts adduced at trial.[6]

6. Even Judge Kozinski, dissenting from the *en banc* majority in the (Cont'd)

In the criminal arena, a district court's finding that a false statement was *not* material and the resulting dismissal of a prosecution would be a matter of law. *See United States v. Gribben*, 984 F.2d 47 (2d Cir. 1992), *reversing*, 792 F. Supp. 960 (S.D.N.Y. 1992). Judges daily make decisions that charges or proof are *insufficient* to sustain a criminal conviction. But once evidence is presented to a jury, and once that jury is instructed as to the elements of the crime, the judge's legal rulings concerning the admitted evidence cannot usurp the jury's role. This Court has refused to tolerate any other instance in which an instruction or ruling usurps the jury's exclusive factfinding function, regardless of the weight of the evidence underlying such a ruling. *See Sandstrom v. Montana*, 442 U.S. 510 (1979) (reversible error if the trial court directs a verdict on an essential element of a crime by giving an instruction that there is a conclusive presumption as to that element).[7]

Legal reasoning which has been accepted over time is not insulated from later critical analysis. Our law is not immutable

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court below, acknowledged that "[t]he continued vitality of *Sinclair* is subject to legitimate question because it antedated the Court's *Winship* line of cases." 28 F.3d at 956 (Kozinski, J., dissenting). Judge Kozinski's minority view that *Sinclair* "was given new life" in the "compelling authority" of *Kungys*' finding that a finding of *non*-materiality was a question of law still begs the question of whether a court may constitutionally weigh evidence and direct a finding adverse to a criminal defendant on an element of a crime.

7. Those lower courts which justify deciding a criminal materiality element as an "exception" to the *Winship* rule do so without constitutional authority, but only on the shirttails of *Sinclair*. *See, e.g., United States v. Brantley*, 786 F.2d 1322 (7th Cir.), *cert. denied*, 477 U.S. 908 (1986). When presented with the issue head-on, this Court has been unwilling to tolerate mandatory presumptions of proof of criminal elements, *Morissette v. United States*, 342 U.S. 246, 274 (1951), and should be equally adverse to an "exception" to the *Winship* rule.

like that of the Medes and the Persians.[8] Where flaws are revealed after years of use, the *Sinclair* statement, admittedly repeated in *Kungys*, should be revisited and discarded.

This Court has never been reticent about reviewing past decisions which are later demonstrated to be faulty, erroneous or outdated.[9] This, too, is such a case.

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8. Daniel 6:12; *see also Hurtado v. California*, 110 U.S. 516, 529 (1884) ("It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.").

9. *See Nichols v. United States*, 114 S. Ct. 1921 (1994), *overruling Baldasar v. Illinois*, 446 U.S. 222 (1980); *United States v. Dixon*, 113 S. Ct. 2849 (1993), *overruling Grady v. Corbin*, 495 U.S. 508 (1990); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992), *overruling Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Keeney v. Tamayo- Reyes*, 504 U.S. 1 (1992), *overruling Townsend v. Sain*, 372 U.S. 293 (1963); *Payne v. Tennessee*, 501 U.S. 808 (1991), *overruling Booth v. Maryland*, 482 U.S. 496 (1987); *Collins v. Youngblood*, 497 U.S. 37 (1990), *overruling Kring v. Missouri*, 107 U.S. 221 (1883), and *Thompson v. Utah*, 170 U.S. 343 (1898); *Alabama v. Smith*, 490 U.S. 794 (1989), *overruling Simpson v. Rice* (decided with *North Carolina v. Pearce*), 395 U.S. 711 (1969); *Thornburgh v. Abbott*, 490 U.S. 401 (1989), *overruling Procunier v. Martinez*, 416 U.S. 396 (1974); *Rodriguez De Quijas v. Shearson/ American Exp., Inc.*, 490 U.S. 477 (1989), *overruling Wilko v. Swan*, 346 U.S. 427 (1953); *South Carolina v. Baker*, 485 U.S. 505 (1988), *overruling Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895); *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988), *overruling Enelow v. New York Life Ins. Co.*, 293 U.S. 379 (1935); *Solorio v. United States*, 483 U.S. 435 (1987), *overruling O'Callahan v. Parker*, 395 U.S. 258 (1969); *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468 (1987), *overruling Parden v. Terminal Railway of Ala. Docks Dept.*, 377 U.S. 184 (1964); *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232 (1987), *overruling General Motors Corp. v. Washington*, 377 U.S. 436 (1964); *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986), *overruling August v. Bronstein*, 417 U.S. 901 (1974); *Batson v. Kentucky*, 476 U.S. 79 (1986), *overruling Swain v. Alabama*, 380 U.S. 202 (1965); *Daniels v.*

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Williams, 474 U.S. 327 (1986), *overruling Parratt v. Taylor*, 451 U.S. 527 (1981); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), *overruling National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruling Maryland v. Wirtz*, 392 U.S. 183 (1968); *Copperweld Corp. Independence Tube Corp.*, 467 U.S. 752 (1984), *overruling United States v. Yellow Cab Co.*, 332 U.S. 218 (1947); *United States v. Ross*, 456 U.S. 798 (1982), *overruling Robbins v. California*, 453 U.S. 420 (1981); *United States v. Salvucci*, 448 U.S. 83 (1980), *overruling Jones v. United States*, 362 U.S. 257 (1960); *Hughes v. Oklahoma*, 441 U.S. 322 (1979), *overruling Geer v. Connecticut*, 161 U.S. 519 (1896); *United States v. Scott*, 437 U.S. 82 (1978), *overruling United States v. Jenkins*, 420 U.S. 358 (1975); *Monell v. New York City Dept. of Social Serv.*, 436 U.S. 658 (1978), *overruling Monroe v. Pape*, 365 U.S. 167 (1961); *Department of Revenue of State of Wash. v. Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978), *overruling Puget Sound Stevedoring Co. v. State Tax Comm'n*, 302 U.S. 90 (1937); *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), *overruling United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), *overruling Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951); *Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), *overruling Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973); *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), *overruling Morey v. Doud*, 354 U.S. 457 (1957); *Lodge 76, Intern. Ass'n of Machinists and Aerospace Workers, AFL CIO v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), *overruling Int'l Union Automobile Workers v. Wisconsin Empl. Relations Board*, 336 U.S. 245 (1949); *Dove v. United States*, 423 U.S. 325 (1976), *overruling Durham v. United States*, 401 U.S. 481 (1971); *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973), *overruling Liggett Co. v. Baldridge*, 278 U.S. 105 (1928); *Andrews v. Louisville & N. R. Co.*, 406 U.S. 320 (1972), *overruling Moore v. Illinois Central R. Co.*, 312 U.S. 630 (1941); *Perez v. Campbell*, 402 U.S. 637 (1971), *overruling Kesler v. Department of Pub. Safety*, 369 U.S. 153 (1962); *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235 (1970), *overruling Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962); *Benton v. Maryland*, 395 U.S. 784 (1969), *overruling Palko v. Connecticut*, 302 U.S. 319 (1937); *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969), *overruling Automatic Radio Co. v. Hazeltine Research, Inc.*, 339 U.S. 827 (1950); *Brandenburg v. Ohio*, 395 U.S. 444 (1969), *overruling Whitney v. California*, 274 U.S. 357 (1927);

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II.

CORRECTING THE MISUSE OF *KUNGYS* AND *SINCLAIR* WILL SERVE THE ADMINISTRATION OF JUSTICE.

Ironically, the materiality-as-a-matter-of-fact rule which *amicus* urges could serve both the government's and future defendants' purposes. Since under the *Sinclair* rule materiality is usually found in the government's favor as a matter of law, one can fairly assume that in the ordinary case proof of that element will not be difficult for the government to establish. Even under the Ninth Circuit's *Gaudin* rule, in the majority of prosecutions the government would have no difficulty at trial proving materiality beyond a reasonable doubt. But where materiality was genuinely at issue, a defendant would have the

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Moore v. Ogilvie, 394 U.S. 814 (1969), *overruling MacDougall v. Green*, 335 U.S. 281 (1948); *Peyton v. Rowe*, 391 U.S. 54 (1968), *overruling McNally v. Hill*, 293 U.S. 131 (1934); *Carafas v. LaVallee*, 391 U.S. 234 (1968), *overruling Parker v. Ellis*, 362 U.S. 574 (1960); *Bruton v. United States*, 391 U.S. 123 (1968), *overruling Delli Paoli v. United States*, 352 U.S. 232 (1957); *Marchetti v. United States*, 390 U.S. 39 (1968), *overruling United States v. Kahriger*, 345 U.S. 22 (1953), and *Lewis v. United States*, 348 U.S. 419 (1955); *Afroyim v. Rusk*, 387 U.S. 253 (1967), *overruling Perez v. Brownell*, 356 U.S. 44 (1958); *Spevack v. Klein*, 385 U.S. 511 (1967), overruling *Cohen v. Hurley*, 366 U.S. 117 (1961); *Harris v. United States*, 382 U.S. 162 (1965), *overruling Brown v. United States*, 359 U.S. 41 (1959); *Swift & Co. v. Wickham*, 382 U.S. 111 (1965), *overruling in part Kesler v. Department of Public Safety*, 369 U.S. 153 (1962); *Pointer v. Texas*, 380 U.S. 400 (1965), *overruling West v. Louisiana*, 194 U.S. 258 (1904); *Gideon v. Wainwright*, 372 U.S. 335 (1963), *overruling Betts v. Brady*, 316 U.S. 455 (1942); *Fay v. Noia*, 372 U.S. 391 (1963), *overruling Darr v. Burford*, 339 U.S. 200 (1950); *Mapp v. Ohio*, 367 U.S. 643 (1961), *overruling Wolf v. Colorado*, 338 U.S. 25 (1949); *James v. United States*, 366 U.S. 213 (1961), *overruling Commissioner of Internal Revenue v. Wilcox*, 327 U.S. 404 (1946); *Brown v. Board of Educ.*, 347 U.S. 483 (1954), *overruling Plessy v. Ferguson*, 163 U.S. 537 (1894).

constitutionally warranted benefit of having the jury evaluate the government's proof of that element of the crime. However, if the jury returned a verdict of guilty, the government would then have the benefit on appeal of the more deferential standard of review of the sufficiency of the evidence. A conviction will be sustained if a rational jury could have found that each element of the crime was established beyond a reasonable doubt. *See Jackson v. Virginia,* 443 U.S. 307, 317-20 (1979). The evidence will be viewed in the light most favorable to the government, giving the government the benefit of all reasonable inferences and credibility choices. *Glasser v. United States,* 315 U.S. 60, 80 (1942).[10] One wonders why the government works so hard here to uphold the *Sinclair* rule; probably it is because the rule serves to permit "materiality" findings, and thus convictions, which a jury might not countenance.

The *Winship/Gaudin* approach to materiality, reserved for those instances in which materiality is an element of the crime, truly serves the fair administration of justice. Judge Kozinski, dissenting below, proffered the spectre of "scores, perhaps, hundreds of prisoners" seeking the benefit of the new rule *via* appellate review and/or collateral proceedings. 28 F.3d at 955 (Kozinski, J., dissenting). That concern is speculative; the complex factors which are relevant to retroactivity and the applicability of assigning materiality to the jury in different statutory contexts are not questions presented in this case. In any event, constitutional standards are not displaced by fears about their future consequences. Even where such concerns are well-founded, optimism guides the course of constitutional history:

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10. Under the present system, a legal determination of materiality is reviewed *de novo. See, e.g., United States v. Evans,* 42 F.3d 586, 592 (10th Cir. 1994); *United States v. Beuttenmuller,* 29 F.3d 973, 982 (5th Cir. 1994) ("While materiality rests upon a factual evidentiary showing by the prosecution, the actual determination of materiality is a question of law for the court, and as such, it is reviewed de novo.")

> The holding of the Court today may well add large new burdens on a profession already overtaxed, but the dynamics of the profession have a way of rising to the burdens placed on it.

Argersinger v. Hamlin, 407 U.S. 25, 44 (1972) (Burger, C.J., concurring). The dynamics of our system can accomodate whatever consequences may flow from following *Winship*.

CONCLUSION

In an 18 U.S.C. § 1001 prosecution, "materiality" is an essential element of the offense. It must therefore be submitted to the jury and be subject to the *In re Winship* requirement of proof beyond a reasonable doubt. *Amicus Curiae* the National Association Criminal Defense Lawyers urges this Court to limit the *Sinclair* materiality rule to judicial rulings that a false statement is *not* material; to recognize that, at trial, materiality is a question of fact; and to affirm the constitutionally correct decision of the *en banc* Ninth Circuit Court of Appeals.

Respectfully submitted,

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